Supreme Court, U.S.
FILED

No. _____ 091165 MAR 22 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

WENDELL MARUMOTO,

Petitioner,

v.

HAUNANI APOLIONA, and STATE OF HAWAII, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

H. WILLIAM BURGESS
Counsel of Record
Attorney at Law
2299C Round Top Drive
Honolulu, Hawaii 96822
(808) 947-3234
hwburgess@hawaii.rr.com
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether the Office of Hawaiian Affairs, "OHA," and the State of Hawaii will be allowed to continue diverting Ceded Lands Trust revenues to support racial separatism.

Whether the court of appeals, by memorandum disposition of Wendell Marumoto's right to intervene, has sanctioned the departure so far from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power.

LIST OF PARTIES

Petitioner is Wendell Marumoto.

Respondents are Virgil E. Day; Mel Hoomanawanui; Josiah L. Hoohuli; Patrick L. Kahawaiolaa; And Samuel L. Kealoha, Office of Hawaiian Affairs; Haunani Apoliona, Rowena Akana, Dante Carpenter, Donald Cataluna, Linda Keawe Ehu Dela Cruz, Collette Y. Piipii Machado, Boyd P. Mossman, Oswald Stender, and John D. Waihee IV, Clayton Hee, Charles Ota, State of Hawaii.

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ORDERS AND OPINION BELOW

The Memorandum Disposition filed October 16, 2009 in the Ninth Circuit Court in No. 08-16668 was not selected for publication in the Federal Reporter. It is available at *Day v. Apoliona*, 334 Fed.Appx. 121, 2009 WL 3326422, 1 (C.A.9).

The June 20, 2008 U.S. District Court, Hawaii, order granting second motion for summary judgment in *Day v. Apoliona*, Civ. No. 05-00649 SOM/BMK is not reported in F.Supp.2d 2008. It is available at WL 2511198 D. Hawaii, 2008.

See App. 1-App. 42.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The court of appeals had jurisdiction under 28 U.S.C. § 1291.

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1343(3) and 1343(4) (civil rights) and 2202 (declaratory judgment).

The Ninth Circuit Court's order denying Wendell Marumoto's petition for panel or *en banc* rehearing in No. 08-16668 was filed December 22, 2009. This petition for certiorari is being timely filed Monday, March 22, 2010.

PROVISIONS INVOLVED

F.R.Civ.P. Rule 24. Intervention

(a) **Intervention of Right**. On timely motion, the court must permit anyone to intervene who:

. . .

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

United States Constitution, Article I, Sec. 10,

No State shall . . . pass any . . . law impairing the obligation of contracts. . . .

United States Constitution, Amendment V

No person shall be . . . deprived of life, liberty, or property without due process of law. . . .

United States Constitution, Amendment XIV, Sec. 1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Resolution No. 55 of July 7, 1898, 30 Stat. 750 (known as the "Annexation Act" or "Newlands Resolution"

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: PROVIDED, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Hawaii Organic Act, April 30, 1900 c 339, 31 Stat. 141

§ 73(e) All funds arising from the sale or lease or other disposal of public land shall be applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the Joint Resolution of Annexation approved July 7, 1898.

Hawaiian Homes Commission Act, 1920 (Act of July 9, 1921 c 42, 42 Stat. 108)

§ 201. Definitions . . .

"Native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.

§ 208. Conditions of leases. Each lease made under the authority granted the department by section 207 of this Act, and the tract to which the lease and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease;

(1) the original lessee shall be a native Hawaiian not less than eighteen years of age . . .

(2) the lessee shall pay a rental of $1 a year for the tract and the lease shall be for a term of ninety-nine years . . .

The Admission Act, An Act to Provide for the Admission of the State of Hawaii into the Union (Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4)

§ 4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner

. . .

but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

§ 5(f). The lands granted to the State of Hawaii by subsection (b) of this section . . . shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined by the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide,. . . .

State of Hawaii Constitution Article XII

Hawaiian Affairs

Hawaiian Homes Commission Act

§ 1 . . . The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of such act.

Acceptance of Compact

§ 2. The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States relating to the management and disposition of the Hawaiian home lands . . . the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.

Office of Hawaiian Affairs;
Establishment of Board of Trustees

§ 5. There is hereby established an Office of Hawaiian Affairs.

Powers of Board of Trustees

§ 6. The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law; to manage and administer the proceeds from the sale or other disposition of the lands . . . including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians;. . . .

The Civil Rights Act, 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner Wendell Marumoto is a citizen and registered voter of the United States and the State of Hawaii. He was born and raised and has lived in Hawaii all his life except for the years at college and graduate school and employment in San Francisco for two years following graduation. He is of Japanese

ancestry, the third generation of his family in Hawaii, and has three grandchildren with a modicum of Hawaiian ancestry.

As beneficiaries of Hawaii's Ceded Lands Trust,[1] he and his family members are among the equitable owners of the trust corpus which is the source of the money and land and power at issue in this appeal.

His declaration and personal statement filed with his motion to intervene in the district court, attest to Hawaii's progression from the Hawaiian Homes Commission Act "HHCA," generally accepted during his teen years as fair because it was limited in scope and duration; to the trend in recent decades, exemplified by the defendants' position in this suit, to make the special treatment permanent and extend it to an ever-increasing number of persons, including those with only one drop of the favored ancestor's blood.

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[1] Hawaii's Ceded Lands Trust (also known as the "Public Land Trust" and the "§ 5(f) trust") originated in 1898 with the Annexation Act. The Republic of Hawaii ceded all its public lands (about 1.8 million acres formerly the Crown lands and Government lands of the Kingdom of Hawaii) to the United States with the requirement that all revenue from or proceeds of these lands except for those used for the civil, military or naval purposes of the United States or assigned for the use of local government, "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Newlands Resolution, Annexation Act, 30 Stat. 750 (1898).

This trend now threatens the just and prosperous society and government of the State of Hawaii to whose development his ancestors and the others contributed after coming to Hawaii from more than 150 years ago.

Facts and proceedings material to consideration of the questions presented.

On August 7, 2007 the Ninth Circuit Court of Appeals entered its decision in this case, *Day v. Apoliona*, 496 F.3d 1027, 1034, FN 9 (9th Cir. 2007) noting, "the lands ceded in the Admission Act are to benefit '*all* the people of Hawaii,' not simply Native Hawaiians." (emphasis in original):

> Our discussions of standing, rights of action, and the scope of the § 5(f) restrictions have arisen in cases brought by Native Hawaiian individuals and groups. But neither our prior case law nor our discussion today suggests that as a matter of federal law § 5(f) funds must be used for the benefit of Native Hawaiians or Hawaiians, at the expense of other beneficiaries. Id.

At 496 F.3d 1033 the Ninth Circuit Court reaffirmed the basic trust law principle that each individual beneficiary has the right to maintain a suit to compel the trustee to perform his duties as trustee; to enjoin the trustee from committing a breach of trust; and to compel the trustee to redress a breach of trust.

> The instant case involves a public trust, and under basic trust law principles, beneficiaries have the right to "maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; [and] (c) to compel the trustee to redress a breach of trust." Restatement 2d of the Law of Trusts, § 199; see also id. § 200, comment a.

In the closing paragraph, at 496 F.3d 1039 and 1040, the Ninth Circuit Court said,

> Cases related to the OHA's expenditure of funds for Native Hawaiians have reached our court on numerous prior occasions, but we and the district court have shed little light on the merits of § 5(f) claims. See generally *Arakaki v. Lingle,* 477 F.3d 1048, 1052-53 (9th Cir. 2007) (citing cases). Absent further foundational issues with Day's claim, today's affirmance of our existing precedent should permit much-needed elucidation of the substance of § 5(f).

A little over two months later, on October 11, 2007 the Ninth Circuit Court granted the State of Hawaii's motion to intervene and ordered filed the State's petition for rehearing and rehearing en banc.

> The State of Hawaii was amicus curiae in this matter in proceedings before the district court and on appeal. It presented an argument that was potentially dispositive of this case, namely, that plaintiffs do not have

> individual rights under § 5(f) of the Hawaiian Admission Act that are enforceable through 42 U.S.C. § 1983. Defendants, including the state Office of Hawaiian Affairs (OHA), took no position with regard to that question.

Day v. Apoliona, 505 F.3d 963, 964 (9th Cir. 2007).

In effect, by its argument that the *Day* plaintiffs have no rights enforceable under § 1983, the State of Hawaii sought to permanently close the door of the federal courts to all beneficiaries of Hawaii's federally-created Ceded Lands Trust. If the State had its way, the federal judiciary would provide no redress for breach of that federally-created trust by the Trustee State of Hawaii or by its agency, OHA.

Concerned at this threat to fundamental rights of trust beneficiaries, Six Non-Hawaiians on November 13, 2007 moved in the Ninth Circuit to intervene "on their own behalf and on behalf of the over one million Hawaii citizens similarly situated" to oppose the State's petition for rehearing.

On November 30, 2007 the Ninth Circuit Court denied the State's petition for rehearing and rejected the State's petition for en banc rehearing. By a separate order also on November 30, 2007, the Court of Appeals denied the Six Non-Hawaiians' motion to intervene "without prejudice to renewal before the district court on remand."

On remand, a scheduling conference was held January 3, 2008 and the magistrate judge entered an

amended scheduling order (Document 121 Case No. 05-00649-SOM-BMK) as follows:

Non-jury trial to commence	November 18, 2008 at 9:00 a.m.
Final pretrial conference	October 7, 2008 at 9:00 a.m.
Final pretrial statements due	September 30, 2008
Motions to join additional parties or amend pleadings due by	April 18, 2008
Other non-dispositive motions	August 20, 2008
Dispositive motions to be filed by	June 18, 2008
Motions in limine to be filed by	October 28, 2008

(Marumoto and his attorney were not notified of the scheduling conference or served with the amended scheduling order.)

The docket indicates that on March 28, 2008, OHA Defendants moved again in the district court for summary judgment.

On May 5, 2008 the attorney for the Six Non-Hawaiians (who also represents Wendell Marumoto in this action) wrote to the Hawaii Attorney General and two of his deputies reminding them of their and their clients' conflicts and demanding that "some capable attorney free of conflict, inform the Trustee State of Hawaii and its Governor and other

responsible officials of their fiduciary duties to all the beneficiaries; and vigorously oppose the OHA motion." (App. 43)

The State Attorney General did not reply to the May 5th letter. The docket entry of May 22, 2008 indicated that, instead of opposing OHA Defendant's motion, the State supported summary judgment in favor of all Defendants.

On May 29, 2008 the Six Non-Ethnic Hawaiians' moved for consolidation of briefing and hearings (ER 8) arguing that, without consolidation of this case and *Kuroiwa v. Lingle*, CV 08-00153 JMS-KSC in the briefing and hearings as to the two issues of "standing" and "expenditure of trust funds to support the Akaka bill": Inconsistent rulings would be likely; and the interests of Ceded Lands Trust beneficiaries who do not meet the definition of "Hawaiian," that is, about 80% of the citizens of Hawaii, would not be represented in this case. On May 30, 2008, the district courts in both *Day v. Apoliona*, CV 05-00649 SOM-BMK and *Kuroiwa v. Lingle*, Civil No. 08-00153 JMS-KSC denied the motion to consolidate.

On June 4, 2008, the State of Hawaii moved for summary judgment on a theory that (as it said) it had never previously advanced in either the district court or the Ninth Circuit: that as a factual matter "in every year since Statehood, the State has spent far more on permissible section 5(f) purposes than it has received in public land trust income."

On June 16, 2008, Wendell Marumoto moved to intervene in this case "to assert a claim against defendants for breach of trust similar to the complaint in *Kuroiwa v. Lingle*, Civil No. CV 08-00153 JMS-KSC.

On June 20, 2008, the district court granted OHA's summary judgment motion and entered final judgment in favor of all defendants, mooting both the State's motion for summary judgment and Wendell Marumoto's motion to intervene.

ARGUMENT

THE DEPARTURE SO FAR FROM THE ACCEPTED AND USUAL

> The general purpose of original Rule 24(a)(2) was to entitle an absentee, purportedly represented by a party, to intervene in the action if he could establish with fair probability that the representation was inadequate. Thus, where an action is being prosecuted or defended by a trustee, a beneficiary of the trust should have a right to intervene if he can show that the trustee's representation of his interest probably is inadequate; similarly a member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court.

West, Federal Rules of Civil Procedure: Rules and Commentary, 2010, Vol. 2, p. 166.

> There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296-297, 62 S.Ct. 1049, 1054-1055, 86 L.Ed. 1480 (1942). But it has long been recognized that a trustee is not an insurer of trust property. As Professor Scott has written, 'A trustee is under a duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.' 2 A. Scott, Trusts 1408 (3d ed. 1967) (hereinafter cited as Scott). See, e.g., *Phelps v. Harris*, 101 U.S. 370, 383, 25 L.Ed. 855 (1880). It follows that '(i)f the trust property is lost or destroyed or diminished in value, the trustee is not subject to a surcharge unless he failed to exercise the required care and skill.' 2 Scott 1419.

U.S. v. Mason, 412 U.S. 391, 397-398, 93 S.Ct. 2202, 2207 (U.S.Ct.Cl. 1973).

The Public Land Trust is for the benefit of all the people of Hawaii. *Rice v. Cayetano*, 528 U.S. 495, 525, 120 S.Ct. 1044, 1061 (2000), Breyer concurring, "But the Admission Act itself makes clear that the 1.2 million acres is to benefit all the people of Hawaii. The Act specifies that the land is to be used for the education of, the developments of homes and farms

for, the making of public improvements for, and public use by, all of Hawaii's citizens, as well as for the betterment of those who are "native."

The government as trustee has the same fiduciary duty as private trustees. *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161, 1189 (1982) (the conduct of the government as trustee is measured by the same strict standards applicable to private trustees, citing *United States v. Mason*, 412 U.S. 391 (1973)). See also *Price v. Akaka*, 928 F.2d 824, 827 (9th Cir. 1991) citing the Restatement 2d of the Law of Trusts as applicable to conduct of the State of Hawaii as trustee of Hawaii's Public Land Trust.

Thus, the advisory committee notes confirm that the general purpose of the original Rule 24(a)(2) was to entitle persons in certain circumstances to intervene as of right. One example of persons so entitled is trust beneficiaries who can show that the trustee is not representing their interests adequately. Another is members of a class action who can demonstrate the class representative is not representing their interests sufficiently.

Marumoto stepped into the battle only after the State declined to accept the fact that the Ceded Lands Trust is for all the people of Hawaii.

He has shown that the State is not adequately representing his interests, or the interests of other beneficiaries similarly situated. Before seeking intervention, his attorney asked the Trustee, State of

Hawaii's Attorney General on May 5, 2008 (App. 43) to engage an attorney without conflicts to vigorously defend the trust against OHA's motion for summary judgment, to seek court instructions and return from OHA of the hundreds of millions still held by OHA. Instead of protecting their interests, the State attacked the beneficiaries, moved for summary judgment in favor of both the State and OHA, and sought no instructions from the Court with respect to their conflicting duties and interests.

To call the State's representation of the interests of most of its citizens "inadequate" is itself inadequate. The following spreadsheet shows the annual payments from the State to OHA as shown on OHA's annual reports from FYE 1981 through FYE 2009. During those 29 years the State distributed to OHA $400 million as the income and proceeds from that pro rata portion of the Ceded Lands Trust for native Hawaiians." While making no distributions exclusively for the rest of the beneficiaries. Their total earnings on the investment of those ceded lands distributions were $137M after deducting $97M in the last two years.

If you add the earnings and amounts from the general fund, the total is about $600M. For the rest of us to receive equal pro rata payments would cost $2.4B. To dispose of Marumoto's case on the ground that he does not establish that it would impair or impede his ability to protect his interests, so far departs from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

State's cash distrbutions to OHA FYE 1981-2009
(Per Fiscal Year as shown on OHA financial statements.)

FYE 6/30	General Fund	Public Land Trust	Interest/ Dividends earned
1981	225,000	1,553,935	35,909
1982	415,466	1,117,005	252,572
1983	540,785	1,380,037	190,613
1984	535,861	1,493,209	167,526
1985	567,178	1,368,834	290,876
1986	589,310	1,452,541	210,219
1987	596,881	1,691,827	214,347
1988	1,297,395	1,188,960	249,635
1989	1,347,638	1,238,429	312,421
1990	2,080,692	1,616,181	363,996
1991	2,052,962	10,800,153	671,492
1992	3,590,887	8,993,725	842,856
1993	3,854,524	139,957,130 *	1,181,983
1994	4,026,704	18,747,890	5,216,977
1995	3,584,625	25,087,967	8,199,984
1996	3,496,698	12,329,159	8,802,574
1997	2,772,596	7,124,122	9,513,999
1998	2,808,201	15,106,347	10,857,620
1999	2,792,382	15,100,000	10,626,578
2000	2,550,922	8,238,109	10,798,857
2001	2,519,663	8,261,921	11,465,433
2002	2,619,663	6,535	9,909,545
2003	2,532,663	17,543,804	8,444,469
2004	2,532,647	9,740,578	3,492,365
2005	2,498,960	10,798,706	6,339,076

* Includes $134,584,489 pd in 1993 for 6/16/80-6/30/91.

2006	2,755,011	32,599,833	11,417,954
2007	2,828,458	15,100,000	16,940,017
2008	3,043,921	15,100,000	**
2009	2,965,721	15,100,000	**
	$63,960,414	$399,836,937	$137,009,893

CONCLUSION

The petition should be granted.

Respectfully submitted,

H. WILLIAM BURGESS
ATTORNEY AT LAW
2299C Round Top Drive
Honolulu, Hawaii 96822
(808) 947-3234
hwburgess@hawaii.rr.com

March 22, 2010

Attorney for Petitioner

** OHA's Investment losses: 2008 – ($24,542,791); 2009 – ($73,639,530).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGIL E. DAY; MEL HOOMANAWANUI; JOSIAH L. HOOHULI; PATRICK L. KAHAWAIOLAA; SAMUEL L. KEALOHA, Jr., Plaintiffs and WENDELL MARUMOTO, Plaintiff-intervenor-Appellant, v. HAUNANI APOLIONA, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian affairs; ROWENA AKANA; DANTE CARPENTER; DONALD CATALUNA; LINDA KEAWE'EHU DELA CRUZ; COLETTE Y. PI'IPI MACHADO; BOYD P. MOSSMAN; OSWALD K. STENDER; JOHN D. WAIHEE, IV, Trustees of the Office of Hawaiian Affairs of the	No. 08-16668 D.C. No. 1:05-CV-00649-SOM-BMK MEMORANDUM* (Filed Oct. 16, 2009)

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

State of Hawaii sued in their official capacities for declaratory and prospective injunctive relief sued in individual capacities for damages; CLAYTON HEE; CHARLES OTA, Former Trustees of the Office of Hawaiian Affairs of the State of Hawaii, sued in their individual capacities for damages,

Defendants-Appellees,

and

STATE OF HAWAII,

Defendant-intervenor-Appellee.

Appeal from the United States District Court
for the District of Hawaii
Susan Oki Mollway, Chief District Judge, Presiding

Submitted October 13, 2009**
Honolulu, Hawaii

Before: BEEZER, GRABER and FISHER, Circuit Judges.

Wendell Marumoto appeals from the district court's denial of his motion to intervene as of right under Federal Rule of Civil Procedure 24(a). We have jurisdiction under 28 U.S.C. § 1291, we review de

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

novo, *S. Cal. Edison Co. v. Lynch,* 307 F.3d 794, 802 (9th Cir. 2002), and we affirm.

The district court properly denied Marumoto's motion to intervene because he does not establish that the disposition of the action may as a practical matter impair or impede his ability to protect his interests. *See United States v. Alisal Water Corp.,* 370 F.3d 915, 919 (9th Cir. 2004). He does not contend that he would be bound by any decision in this case or that, by virtue of stare decisis, a proper party would be precluded from raising his challenges to the State's actions in a separate action.

Marumoto lacks standing to appeal from the district court's summary judgment because he is not a party to this action, did not participate in the summary judgment proceedings in the district court and has not shown that the equities weigh in favor of permitting him to appeal. *See S. Cal. Edison Co.,* 307 F.3d at 804.

Marumoto's motion to supplement the record is denied.

AFFIRMED.

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

VIRGIL E. DAY, ET AL.,

Plaintiff(s),

V.

HAUNANI APOLIONA, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs, et al.,

Defendant(s).

STATE OF HAWAII,

Intervenor-Defendant

JUDGMENT IN A CIVIL CASE

Case:
CV 05-00649 SOM BMK

(Filed June 20, 2008)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✓] **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that JUDGMENT is entered in favor of Defendants pursuant to the, "ORDER GRANTING SECOND MOTION FOR SUMMARY JUDGMENT", by the Honorable SUSAN OKI MOLLWAY, U.S. District Judge, and filed on June 20, 2008.

cc: All counsel of record

[SEAL]

June 20, 2008	SUE BEITIA
Date	Clerk
	/s/ [Illegible]
	(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

VIRGIL E. DAY, et al., Plaintiffs, vs. HAUNANI APOLIONA, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs, et al., Defendants, and STATE OF HAWAII, Intervenor-Defendant.	Civ. No. 05-00649 SOM/BMK ORDER GRANTING SECOND MOTION FOR SUMMARY JUDGMENT (Filed Jun. 20, 2008)

ORDER GRANTING SECOND MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION.

Plaintiffs are individuals who describe themselves as having "not less than one-half part" Hawaiian blood. They challenge the manner in which the Office of Hawaiian Affairs ("OHA"), the current trustee of a public land trust created by the act through which Hawaii became a state, P.L. 86-3 (March 18, 1959), *reprinted in* 73 Stat. 4, 5 ("Admission Act"), has been and is spending certain funds it controls. Plaintiffs argue that OHA is violating federal law by

spending the public trust money to better the conditions of all persons having any quantum of Hawaiian blood, instead of restricting such spending to benefit only people who, like them, have "not less than one-half part" Hawaiian blood.

To the extent Count I of the First Amended Complaint seeks to hold the OHA trustees individually liable for damages under § 1983, the court grants the individual trustees summary judgment, as the trustees are exercising their reasonable fiduciary judgment in determining how to further the purposes of the trust. To the extent Counts I, II, and IV of the First Amended Complaint seek injunctive relief or a declaration that, under the Admission Act, the OHA trustees must use public trust funds only for the betterment of the conditions of people who have "not less than one-half part" Hawaiian blood, the court rules that the Admission Act is not so restrictive. The court need not decide whether state law requires the public trust to be spent in the manner Plaintiffs advocate, as this court has already dismissed all state claims.

II. BACKGROUND.

The facts pertinent to this motion have been set forth in previous decisions. *See, e.g., Day v. Apoliona*, 496 F.3d 1027 (9th Cir. 2007). In brief, the public trust created by the Admission Act is to be used for one or more of five enumerated purposes:

> [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use.

P.L. 86-3, § 5(f), 73 Stat. at 6; *see also Day,* 496 F.3d at 1028; *Price v. Akaka,* 3 F.3d 1220, 1222 (9th Cir. 1993).

There is no dispute that Hawaii has delegated its public trust duties arising under the Admission Act to OHA or that the restrictions on the uses of the public trust apply to OHA. *See Price,* 3 F.3d at 1222 (noting that the restrictions in the Admission Act "apply to the use or disposal of the income by OHA"). Under state law, "OHA is funded in part with twenty percent of all income derived from the § 5(f) public trust." *Id.*; *see also* Haw. Rev. Stat. § 10-13.5 (1990) ("Twenty per cent of all funds derived from the public land trust . . . shall be expended by [OHA] for the purposes of this chapter."). State law requires OHA to use trust funds "for the betterment of the conditions of native Hawaiians." Haw. Rev. Stat. § 10-3(1) ("A pro rata portion of all funds derived from the public land trust shall be funded in an amount to be determined by the legislature . . . , and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians."). OHA also receives other funds

that need not be used for any of the purposes enumerated in the Admission Act. *See Day,* 496 F.3d at 1030.

Plaintiffs Virgil E. Day, Mel Hoomanawanui, Josiah L. Hoohuli, Patrick L. Kahawaiolaa, and Samuel L. Kealoha, Jr., (collectively, "Plaintiffs") claim to be "native Hawaiians," as that term is defined in the Hawaiian Homes Commission Act ("HHCA")," 42 Stat. 108 (1921). First Amended Complaint (March 10, 2006) 91 4. The HHCA defines "native Hawaiians" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." 42 Stat. 108; *see also Rice v. Cayetano,* 528 U.S. 495, 507 (2000) (noting that the HHCA "defined 'native Hawaiians' to include 'any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778' "). In this order, the court uses the term "native Hawaiian" as defined in the HHCA.

As native Hawaiian beneficiaries of the public trust, Plaintiffs claim that the OHA trustees have violated and continue to violate OHA's public trust duties by failing to use trust funds "for the betterment of the conditions of native Hawaiians" only, to the exclusion of other people. Plaintiffs challenge OHA's use of trust funds for the benefit of "Hawaiians"

without regard to blood quantum.[1] *See, e.g.*, First Amended Complaint ¶ 11.

The First Amended Complaint asserts that Defendants: (1) violated their rights under the Admission Act and the Equal Protection Clause of the Fourteenth Amendment, to the extent those rights are enforceable under 42 U.S.C. § 1983, by expending public trust funds "without regard to the blood quantum contained in the definition of native Hawaiians in HHCA" (Counts I and II); and (2) "breached their duty under the common law of the State of Hawaii and H.R.S. § 10-16(c) of fidelity owed to Plaintiffs as 'native Hawaiian' beneficiaries" (Count III). Although the First Amended Complaint is not entirely clear about the relief it seeks, this court has ruled that, with respect to Counts I through III, Plaintiffs seek damages against the OHA trustees in their individual capacities, and declaratory and injunctive relief against the OHA trustees in their official capacities. *See* Order Dismissing Action (Aug. 10, 2006) at 4.

Count IV of the First Amended Complaint also seeks the following declaratory relief:

> To the extent that . . . judicial decisions and statutory and constitutional provisions do

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[1] In this order, the court uses the term "Hawaiian" as defined in Haw. Rev. Stat. § 10-2, which uses "Hawaiian" to mean "any descendent of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii."

> not clearly establish that all land, income and proceeds therefrom, received by OHA defendants directly or indirectly from the § 5(f) trust must be expended by OHA Defendants for the betterment of the conditions of native Hawaiians, Plaintiffs are entitled to a declaratory judgment holding that all land, income and proceeds received by OHA Defendants directly or indirectly from the § 5(f) trust must be expended by OHA defendants for the betterment of the conditions of native Hawaiians as defined in the [HHCA].

First Amended Complaint ¶ 32.

Plaintiffs identify four specific instances in which they say OHA is using public trust funds for purposes not limited to the betterment of the conditions of native Hawaiians. Plaintiffs say that public trust funds are being used to support (1) proposed federal legislation commonly referred to as the "Akaka Bill," (2) the Native Hawaiian Legal Corporation; (3) the Nā Pua No'eau Education Program; and (4) Alu Like. None of the four matters expressly limits itself to bettering the conditions of only native Hawaiians.

On February 22, 2006, this court granted summary judgment in favor of two former OHA trustees, Clayton Hee and Charles Ota, ruling that the statute of limitations barred Plaintiffs' § 1983 claims against them. On March 10, 2006, Plaintiffs filed a First Amended Complaint, reasserting the same § 1983 claims against Hee and Ota. On June 14, 2006, Hee and Ota filed a second motion for summary judgment

based on the statute of limitations. Plaintiffs did not oppose this motion, *see* Statement of Non-Opposition to the Second Motion for Summary Judgment of Defendants Hee and Ota (July 21, 2006), and have since abandoned their claims against them. *See* Memorandum in Opposition to OHA Defendants' Second Motion for Summary Judgment (May 22, 2008) at 2 ("On appeal, Plaintiffs did not appeal this court's dismissal . . . of claims against Defendants HEE and ODA [sic]"). Accordingly, no claims remain against Hee or Ota.

On August 10, 2006, this court dismissed the § 1983 claims asserted in Counts I and II of the First Amended Complaint, ruling that, in light of *Gonzaga University v. Doe*, 536 U.S. 273 (2002), Plaintiffs may not enforce the Admission Act through § 1983. *See* Order Dismissing Action (Aug. 10, 2006). The court also dismissed the Equal Protection claims asserted in Counts I and II, ruling that Plaintiffs had not alleged that they had been treated differently than similarly situated people. *Id.* Finally, the court determined that Counts III and IV of the First Amended Complaint asserted state law claims and declined to exercise supplemental jurisdiction over those claims. *Id.* To the extent Plaintiffs were attempting to seek declaratory relief under § 1983, the court dismissed the federal claims asserted in Count IV based on *Gonzaga*. Plaintiffs appealed. *See* Notice of Appeal (Aug. 16, 2006).

On appeal, Plaintiffs did not challenge this court's dismissal of their Equal Protection claims or

their state law claims. *See* Memorandum in Opposition to OHA Defendants' Second Motion for Summary Judgment (May 22, 2008) ("On appeal, Plaintiffs did not appeal this court's dismissal of their equal protection claim, of claims against Defendants HEE and ODA [sic] nor state law claims asserted in Count III."). Plaintiffs did challenge this court's dismissal of the § 1983 claims asserted in Counts I and II and contended that Count IV sought a declaration pursuant to § 1983 that the current OHA trustees owe native Hawaiians a duty of loyalty under section 5(f) of the Admission Act. *See* 2006 W.L. 4109553, Appellants' Opening Brief, No. 06-16625 (Dec. 18, 2006).

On December 19, 2007, the Ninth Circuit reversed this court's determination that *Gonzaga* foreclosed Plaintiffs' § 1983 claims. The Ninth Circuit held that, as alleged beneficiaries of the public trust, the native Hawaiian Plaintiffs have "an individual right to have the trust terms complied with, and therefore can sue under § 1983 for violation of that right." *Day,* 496 F.3d at 1039. The Ninth Circuit noted, "Violations of this right may include, at minimum, wrongs of the type of which Day complains: expenditure of funds for purposes not enumerated under § 5(f)." *Id.* The Ninth Circuit left it to this court "to interpret those § 5(f) purposes to determine in the first instance not only whether Day's allegations are true, but also whether the described expenditures in fact violate § 5(f)." *Id.* As Plaintiffs' state law claims had been dismissed and Plaintiffs had not appealed their dismissal, the Ninth Circuit made it clear that

this court is to determine only whether OHA is violating federal law. *See id.* That is, this court must only determine whether OHA's actions comply with any of the five enumerated purposes of the public trust created by section 5(f) of the Admission Act, not whether state law requires OHA to use the public trust solely for the benefit of native Hawaiians.

III. SUMMARY JUDGMENT STANDARD.

Effective December 1, 2007, Rule 56(c) of the Federal Rules of Civil Procedure has been amended. Summary judgment shall be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (effective Dec. 1, 2007). "The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only." Rule 56 Advisory Committee Notes, 2007 Amendments. Because no substantive change in Rule 56(c) was intended, the court interprets the new rule by applying precedent related to the prior version of Rule 56(c).

One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). "Only admissible

evidence may be considered in deciding a motion for summary judgment." *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 988 (9th Cir. 2006). Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. *See Celotex*, 477 U.S. at 323. A moving party has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden initially falls on the moving party to identify for the court "those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp.*, 477 U.S. at 323); *accord Miller*, 454 F.3d at 987. "A fact is material if it could affect the outcome of the suit under the governing substantive law." *Miller*, 454 F.3d at 987.

On a summary judgment motion, "the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor." *Miller*, 454 F.3d at 988 (quotations and brackets omitted).

IV. ANALYSIS.

A. OHA Trustees Named As Defendants In their Individual Capacities Are Entitled To Summary Judgement on the Merits of the § 1983 Claims Asserted in Count I.

The state law claims having been dismissed, Count I of the First Amended Complaint has been pared down. Still in issue are damage claims brought under 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Plaintiffs claim that the OHA trustees named as Defendants in their individual capacities are individually liable for their alleged misuse of public trust

funds. Count I asserts that the OHA trustees violated the provisions of the trust created by the Admission Act when they expended trust funds to (1) support the Native Hawaiian Government Reorganization Act of 2007, a.k.a. "the Akaka Bill"; (2) support the Native Hawaiian Legal Corporation; (3) support the Nā Pua No'eau Education Program; and (4) support Alu Like. The Ninth Circuit recognized that Plaintiffs may assert claims under § 1983 for "expenditure of funds for purposes not enumerated under § 5(f)" of the Admission Act. *Day,* 496 F.3d at 1039.

The First Amended Complaint actually attempts to allege a violation of § 1983 based on an alleged violation of state law. Plaintiffs argue that, under sections 10-3 and 10-13.5 of the Hawaii Revised Statutes, the OHA trustees were required to use the public trust only for the betterment of the conditions of native Hawaiians. However, Plaintiffs conceded at the hearing that a violation of state law is not actionable under § 1983 unless, of course, the state law violation is also a violation of a party's federal right. *See Moreland v. Las Vegas Metro. Police Dept.,* 159 F.3d 365, 371 (9th Cir. 1998) ("state law violations do not, on their own, give rise to liability under § 1983"); *Campbell v. Burt,* 141 F.3d 927, 930 (9th Cir. 1998) ("As a general rule, a violation of state law does not lead to liability under § 1983."); *accord Tierney v. Vahle,* 304 F.3d 734, 741 (7th Cir. 2002) ("a violation of state law is not actionable under section 1983"); *Bagley v. Rogerson* 5 F.3d 325, 328 (8th Cir. 1993) ("We have held several times that a violation of state

law, without more, does not state a claim under the federal Constitution or 42 U.S.C. § 1983."). Accordingly, for purposes of the § 1983 claim asserted in Count I, this court examines only whether the OHA trustees violated a federal right or statute, in this case, the Admission Act. Whether the OHA trustees are violating state law by using public trust funds to support the Akaka Bill, the Native Hawaiian Legal Corporation, the Nā Pua No'eau Education Program, and Alu Like is not before this court.

No material factual dispute is before this court. It is undisputed that OHA is using public trust funds to support the Akaka Bill, the Native Hawaiian Legal Corporation, the Nā Pua No'eau Education Program, and Alu Like, none of which reserves its benefits for only native Hawaiians.

The issue before this court is whether section 5(f) of the Admission Act permits the use of the public trust funds for purposes other than to benefit only native Hawaiians, e.g., to support the Akaka Bill, the Native Hawaiian Legal Corporation, the Nā Pua No'eau Education Program, and Alu Like. Because these expenditures of trust funds are consistent with the Admission Act, Defendants are entitled to summary judgment on Plaintiffs' § 1983 claims.

This court recognizes that, because there is no material factual dispute in this case, any examination of the merits of Plaintiffs' § 1983 claims mirrors the analysis applicable to the qualified immunity defense Defendants raise with respect to the § 1983 claims.

That is, a review of the substantive merits of the § 1983 claims requires the same consideration as a review of at least the first prong of the qualified immunity defense.

"Qualified immunity . . . shields § 1983 defendants 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Devereaux v. Abbey,* 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)); *see also Price,* 3 F.3d at 1225. The qualified immunity doctrine protects government officials from their exercise of poor judgment and fails to protect only those who are "plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). The purpose of qualified immunity is to protect officials from undue interference with their duties and from potentially disabling threats of liability. *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 70 F.3d 1095, 1098 (9th Cir. 1994). The Supreme Court has therefore stated that qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. *Saucier v. Katz,* 533 U.S. 194, 200 (2001). The Supreme Court has cautioned that a ruling on a qualified immunity defense "should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Id.*

The qualified immunity analysis is a two-step process. First, a court examines whether the facts alleged, taken in the light most favorable to the party

asserting the injury, show that the defendant's conduct violated a constitutional or statutory right. *See Kwai Fun Wong v. United States,* 373 F.3d 952, 961 (9th Cir. 2004). In this initial inquiry, this court is obligated to accept a plaintiff's facts as alleged, but the court need not accept a plaintiff's application of the law to the facts. *See Martin v. City of Oceanside,* 360 F.3d 1078, 1082 (9th Cir. 2004). It is this initial inquiry in a qualified immunity analysis that this court is equating in this case with a review of the substantive merits of Plaintiffs' § 1983 claims, that is, of what Plaintiffs have the burden of establishing in their own case-in-chief. If no constitutional or statutory right would have been violated by the alleged actions, the qualified immunity inquiry ends, and a defendant has qualified immunity. If a violation could indeed be made out when the facts are interpreted in the light most favorable to the injured party, the qualified immunity analysis continues.

The court turns now to examining the details of the merits/qualified immunity issues raised by the § 1983 claims. If the OHA trustees sued in their individual capacities succeed in establishing that Plaintiffs cannot prevail with respect to the § 1983 claims, the OHA Trustees simultaneously and redundantly are entitled to qualified immunity with respect to those claims.

1. Akaka Bill.

Plaintiffs assert that the OHA trustees have violated and are violating section 5(f) of the Admission Act by spending public trust funds to support the Akaka Bill. Plaintiffs say that spending trust funds to support a bill that, if passed, will not be limited to benefitting native Hawaiians only, violates the requirement that trust funds be used for the betterment of the conditions of native Hawaiians. This court disagrees.

The OHA trustees are charged with administering the public trust. Under the terms of the Admission Act, they are allowed to use trust funds for the betterment of the conditions of native Hawaiians. Because the Admission Act is silent as to exactly how the funds must be used to better the conditions of native Hawaiians, the OHA trustees have broad discretion in making that determination. Section 87 of the Restatement (Third) of Trusts (2007) notes that, "When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion."

The Ninth Circuit has already recognized the possibility that the OHA trustees may exercise their discretion in using public trust funds in a manner that benefits native Hawaiians, as well as others. In fact, the Ninth Circuit has already provided guidance regarding the merits of Plaintiffs' claims:

> Although we do not address the merits of Day's claims, we note for the sake of example

> and clarity that the common law of trusts offers guidance on two of the issues that Day's claims present: (1) how a court should determine whether activities funded by the trust funds are "for the betterment" of Native Hawaiians, and (2) whether trust funds can be spent in a way that serves Native Hawaiians, but also, incidentally, benefits other individuals. One treatise suggests: To the extent to which the trustee has discretion, the court will not control his exercise of it as long as he does not exceed the limits of the discretion conferred upon him. . . . Even where the trustee has discretion, however, the court will not permit him to abuse the discretion. This ordinarily means that so long as he acts not only in good faith and from proper motives, but also within the bounds of a reasonable judgment, the court will not interfere; but the court will interfere when he acts outside the bounds of a reasonable judgment.

Day, 496 F.3d at 1034 n.10 (citing Austin W. Scott & William F. Fratcher, 3 *The Law of Trusts* § 187 (4th ed. 2001)).

Plaintiffs conceded at the hearing on the present motion that the OHA trustees had broad discretion in determining what is for the betterment of the conditions of native Hawaiians, but argued that the OHA trustees abused their discretion in supporting the Akaka Bill. This court disagrees. The Akaka Bill seeks to provide for a process through which the United States will recognize a Hawaiian governing

entity. *See* Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Cong. (2007). The Akaka Bill provides that it does not affect the definition of "Native Hawaiian" under any other federal or state law. *See id.* sec. 3, ¶10(B).

This court is guided by the comments to section 87 of the Restatement, which provides an example of a trustee's broad discretion in exercising the powers of a trusteeship. It notes that, even when the trust has mandatory provisions, "the trustee often has some discretionary authority and responsibility in important matters of detail and implementation." Restatement (Third) of Trusts § 87, cmt. a. (2007). For example, a trust may require the sale of property. If the trust fails to further describe the details of how the property is to be sold, a trustee may exercise "fiduciary judgment with respect to the timing . . . , price, and other terms of the sale." *Id.*

Like a trustee's exercise of fiduciary judgment in the details of the sale of the property, the OHA trustees may exercise reasonable fiduciary judgment in expending trust funds in support of the Akaka Bill. Even if the Akaka Bill is intended to benefit Hawaiians in general, the OHA trustees would not be unreasonable or arbitrary in viewing the Akaka Bill as also benefitting native Hawaiians. Numerous legal challenges have been brought against Hawaiian-only and native Hawaiian-only programs. These legal challenges often assert Equal Protection violations. Although most race-based preferences are subject to "strict scrutiny," preferences given to American

Indian tribes are reviewed under the "rational basis" standard. *See Morton v. Mancari*, 417 U.S. 535 (1974). The passage of the Akaka Bill might ultimately affect whether programs benefitting only Hawaiians and native Hawaiians are reviewed under the "strict scrutiny" standard as involving racial preferences, or under a "rational basis" standard as involving a political preference. It cannot be said that the OHA trustees are abusing their discretion in supporting legislation that could affect challenges to programs favoring Hawaiians and native Hawaiians. The OHA trustees are reasonably exercising their fiduciary judgment when they expend trust funds in support of the Akaka Bill. That action is consistent with the public trust requirement that trust funds be used for the betterment of the conditions of native Hawaiians, even if the funds simultaneously better the conditions of Hawaiians.

Nothing in section 5(f) of the Admission Act prohibits the use of trust funds that, while bettering the condition of native Hawaiians, also benefits the conditions of others. Plaintiffs read section 5(f) in a cramped, exclusionary manner that, if accepted, could lead to ridiculous results. Suppose, for instance, that the OHA trustees decided to better the conditions of native Hawaiians by giving each native Hawaiian $5,000. A particular native Hawaiian might donate his $5,000 to the American Cancer Society, while another might buy a piece of jewelry. Would Plaintiffs sue OHA for failing to limit the use of the first person's $5,000 to the provision of goods to only

native Hawaiians, while the second person's use was legal because it was used to buy something personal for that particular native Hawaiian?

Or suppose a particular disease disproportionately affected native Hawaiians. And suppose further that OHA, in an attempt to address an epidemic affecting a large percentage or even a majority of native Hawaiians, initiated a study or contributed to a pre-existing research program concerning the disease. Would Plaintiffs object because the expenditure would also benefit Hawaiians or, say, Samoans who also suffered from the disease? Would OHA be barred under Plaintiffs' reasoning from supporting such research simply because its benefits would not flow exclusively to native Hawaiians?

As a final illustration, the court considers whether Plaintiffs would challenge a program in which OHA offered to pay all medical expenses relating to the birth of any native Hawaiian child. These expenses would naturally include the cost of prenatal care for the birth mother. But suppose the birth mother was Hawaiian, with a 25 percent blood quantum, while the birth father was native Hawaiian, with a 75 percent blood quantum. The child would be native Hawaiian, but treatment during the pregnancy would benefit not only the native Hawaiian child, but also the Hawaiian mother. Would Plaintiffs object to the benefits flowing to the Hawaiian mother?

The court presents these scenarios only to highlight that the logical result of Plaintiffs' position could ultimately be detrimental to native Hawaiians. The OHA trustees must be allowed to exercise reasonable judgment in determining how to satisfy section 5(f). In including the purpose of bettering the conditions of native Hawaiians, section 5(f) simply does not, as Plaintiffs contend, hamstring the trustees by requiring that they absolutely avoid simultaneously benefitting others.

Plaintiffs themselves, while challenging simultaneous benefits, may not actually think all simultaneous benefits are improper. At the hearing, Plaintiffs praised OHA's recent use of the public trust to support the Department of Hawaiian Home Lands' provision of housing to native Hawaiians. However, the Department of Hawaiian Home Lands does not restrict who can live in a Hawaiian Home Lands house. When the Department of Hawaiian Home Lands grants a house to an eligible native Hawaiian, the native Hawaiian might live in the house with a non-Hawaiian spouse and Hawaiian children. If Plaintiffs accept this situation as consistent with section 5(f), the court wonders why they challenge other expenditures that benefit not only native Hawaiians but Hawaiians as well.

Consistent with the Ninth Circuit's guidance in *Day*, 496 F.3d at 1034 n.10, the Restatement makes clear that courts "will not interfere with a trustee's exercise of a discretionary power . . . when that

conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee's fiduciary duties." Restatement (Third) of Trusts § 87, cmt. b. (2007). Nothing in the record indicates that the OHA trustees are supporting the Akaka Bill in bad faith or based on an otherwise improper motive. The OHA trustees are entitled to summary judgment on the merits of Plaintiffs' § 1983 claim seeking individual liability for the trustees' support of the Akaka Bill.

At the hearing, Plaintiffs argued that the OHA trustees are breaching the public trust because the benefit to native Hawaiians is the same as the benefit to every other member of the public. This court is unpersuaded. The Akaka Bill does not benefit every member of the public equally. The OHA trustees are exercising their reasonable fiduciary judgment and broad discretion in spending public trust money lobbying for a bill that lays the foundation for recognition of a Hawaiian/native Hawaiian government.

Although this court earlier in this order equated its analysis of the substantive merits of the § 1983 claims with the application of the first prong of the qualified immunity test, the court is struck by the similarity between the court's examination of the OHA trustees' reasonableness or good faith and the second prong of the qualified immunity test. That second prong, which is not reached if no constitutional violation is made out by a plaintiff's allegations, inquires whether the right allegedly violated was clearly established. That is, a defendant has

qualified immunity if the law did not put him or her clearly on notice that the conduct in issue was unlawful. *Saucier*, 533 U.S. at 201. The conclusion here that the OHA trustees acted reasonably and within their discretion as trustees is akin to a conclusion that they violated no clearly established law.

Similarly, in *Price*, 3 F.3d 1220, a § 1983 claim asserted that the OHA trustees improperly used section 5(f) public trust funds to mail and distribute referendum ballots. The trustees had proposed a "Single Definition Referendum" concerning whether the definition of "native Hawaiian" should be amended to include all people of Hawaiian ancestry and not just those with 50% or more Hawaiian blood. *Id.* at 1222. The plaintiffs in *Price* alleged that this use of trust funds violated the terms of section 5(f) of the Admission Act because funds were used to benefit non-native Hawaiians. *Id.* at 1223. The Ninth Circuit determined, in a pre-*Saucier* case, that the OHA trustees had qualified immunity from these claims, as "there is no clearly established law prohibiting the OHA trustees from expending § 5(f) funds in support of the Single Definition Referendum which questioned the 50% or more blood quantum requirement for native Hawaiian status." *Id.* at 1225. In so ruling, the Ninth Circuit stated that the "OHA trustees reasonably believed that a referendum to determine Hawaiian opinion on the proper definition of 'native Hawaiian' was for the 'betterment of the conditions of native Hawaiians' as presently defined." *Id.* at 1226.

The OHA trustees' belief that support of the Akaka Bill benefits native Hawaiians is equally reasonable.

2. Native Hawaiian Legal Corporation.

There is no dispute that the OHA trustees are using trust funds to support the Native Hawaiian Legal Corporation. Exhibit B to the Concise Statement in support of the Second Motion for Summary Judgment is a contract between OHA and the Native Hawaiian Legal Corporation.[2] Page two of the contract states that, consistent with Act 170, Regular Session Laws of Hawaii, 2007, the Native Hawaiian Legal Corporation is awarded $567,302.00 from general funds and $567,302.00 from the public trust fund for fiscal year 2007-2008. For fiscal year 2008-2009, those amounts increase to $592,302.00, respectively. Plaintiffs argue that this use of trust funds does not further any purpose set forth in the Admission Act. The court disagrees.

According to page 3 of OHA's contract with the Native Hawaiian Legal Corporation, the Native Hawaiian Legal Corporation is to

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[2] Plaintiffs challenge the authenticity of OHA's contract with the Native Hawaiian Legal Corporation, claiming that it is not authenticated. However, this contract is properly authenticated by the Declaration of Ernest M. Kimoto, who states that he is the senior counsel to the Administrator at OHA and that Exhibit B is a true and accurate copy of the contract contained in OHA's records and files. Declaration of Ernest M. Kimoto (March 27, 2008) ¶¶ 1, 4.

render legal services and provide legal representation to clients in substantive areas which shall include but shall not be limited to:

(a) Assertion and defense of quiet title actions;

(b) Protection, defense and assertion of ahupua'a and kuleana tenant rights, including rights of access and rights to water;

(c) Land title assistance, including review of title and genealogy;

(d) Preservation and perpetuation of traditional and customary practices;

(e) Protection of culturally significant places, including burial sites and material culture; and

(f) Preservation of Native Hawaiian Land Trust entitlements.

As noted above, the Admission Act requires trust lands and funds to be used for one or more of five enumerated purposes:

[1] for the support of the public schools and other public educational institutions,
[2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended,
[3] for the development of farm and home ownership on as widespread a basis as

> possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use.

P.L. 86-3, § 5(f), 73 Stat. at 6; *see also Day*, 496 F.3d at 1028; *Price*, 3 F.3d at 1222.

OHA's contract with the Native Hawaiian Legal Corporation and OHA's resulting expenditure of trust funds supports more than one of the public trust's purposes. The provision of legal services arguably betters the conditions of native Hawaiians because it helps to preserve and perpetuate their traditional and customary practices, protect culturally significant areas, and help them assert their legal rights regarding land and water in court. The Native Hawaiian Legal Corporation contract also can be said to aid farm and home ownership, as it specifically calls for the assertion and protection of land and water rights. Conceivably, the Native Hawaiian Legal Corporation's services will make public improvements in the course of asserting rights of access and protecting culturally significant places. Finally, the contract can be said to help provide for lands for public use, as it calls for the protection of culturally significant places and for the preservation and perpetuation of traditional and customary practices.

Nothing in the record establishes that the OHA trustees failed to use reasonable judgment in interpreting the Admission Act as allowing OHA to support this program to benefit native Hawaiians, while simultaneously benefitting Hawaiians in general. As

Plaintiffs do not establish that the OHA trustees abused their discretion in this regard, Plaintiffs cannot prevail on this point. The OHA trustees are entitled to summary judgment on Plaintiffs' § 1983 claims challenging the Native Hawaiian Legal Corporation expenditure.

3. Nā Pua No'eau Education Program.

There is no dispute that the OHA trustees are distributing trust funds to the University of Hawai'i at Hilo, for and on behalf of Nā Pua No'eau, the Center for Gifted and Talented Native Hawaiian Children. OHA has entered into a contract with the University of Hawai'i at Hilo, agreeing to provide it with $490,433 in general funds and $490,433 in trust funds for fiscal year 2007-2008. This contract is consistent with the funding provided by the Hawai'i legislature in Act 170, section 6, Regular Session Laws of Hawaii, 2007. According to page 2 of the contract, which is attached to Defendants' Concise Statement as Exhibit D, the University of Hawai'i at Hilo, through its Nā Pua No'eau program, is to "provide for educational enrichment programs for native Hawaiian children in grades K through 12 throughout the State of Hawaii."[3] The program is "to

[3] Plaintiffs question whether the Nā Pua No'eau contract has been properly authenticated. Kimoto, a senior counsel to the Administrator at OHA, states in his declaration that a true and accurate copy of the contract contained in OHA's records and

(Continued on following page)

be designed to optimize learning for Hawaiian students" and is supposed "to develop a stronger interest in learning, connect learning and education to one's Hawaiian identity, and explore possible educational, career and academic goals."

The use of trust funds to support this educational program is consistent with the Admission Act, which allows the trust to be used for the support of public schools and other public educational institutions. There is no dispute that the University of Hawaii at Hilo is a public educational institution. Although the trust money being given to it is intended to benefit only a small portion of students – those with Hawaiian ancestry, the trustees have not abused their reasonable discretion in determining that provision of trust funds to the university is consistent with the trust's purposes. The OHA trustees exercising their fiduciary judgment may determine that public education is being furthered by supporting the Nā Pua No'eau program.

The use of trust funds to support the Nā Pua No'eau program also arguably betters the conditions of native Hawaiians in ensuring that learning is connected to students' Hawaiian identity. Native Hawaiians stand to benefit if Hawaiian identity in general is preserved and pride in Hawaiian identity fostered. The OHA trustees were authorized to

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files is attached as Exhibit D. Kimoto Decl. ¶¶ 1, 5. The contract is properly authenticated.

exercise their fiduciary judgment in determining the details of how to better the conditions of native Hawaiians through the use of trust funds. Nothing in the record establishes that the OHA trustees failed to use reasonable judgment in interpreting the Admission Act as allowing OHA's support of this program, which, while benefitting native Hawaiians, also benefits Hawaiians in general. The OHA trustees are entitled to summary judgment with respect to the § 1983 claims concerning this program.

4 Alu Like.

Pursuant to a contract, the OHA trustees are disbursing public trust funds to Alu Like. *See* Ex. E to Defendants' Concise Statement.[4] On page 4 of that contract, OHA agrees to provide Alu Like with $830,000. In Act 170, the Hawaii legislature explains that $415,000 will come from general funds and $415,000 from public trust funds. *See* Session Laws of Haw., Act 170, section 5 (Reg. Sess. 2007). Alu Like is a nonprofit organization that strives to help Hawaiians and native Hawaiians achieve social and economic self-sufficiency through the provision of early childhood education and child care, elderly

[4] Plaintiffs challenge the authenticity of the Na Pua No'eau contract. Kimoto, a senior counsel to the Administrator at OHA, states in his declaration that a true and accurate copy of the contract contained in OHA's records and files is attached as Exhibit E. Kimoto Decl. ¶¶ 1, 6. The contract is properly authenticated.

services, employment preparation and training, library and genealogy services, specialized services for at-risk youth, and information and referral services. *See* Proposal Application (attached as part of Ex. E).

In supporting Alu Like, the OHA trustees have exercised their reasonable discretion and fiduciary judgment. Alu Like's programs better the conditions of native Hawaiians and support public education, the first and second purposes listed in section 5(f) of the Admission Act. The OHA trustees did not abuse their considerable discretion in determining that one of the ways they were going to better the conditions of native Hawaiians was by providing support to a service organization with the mission of helping Hawaiians and native Hawaiians achieve social and economic self-sufficiency. Because the OHA trustees acted consistently with their duties under the Admission Act, the OHA trustees are entitled to summary judgment with respect to Plaintiffs' § 1983 claims asserting that the trustees have improperly used public trust funds in support of Alu Like.

B. OHA Trustees Are Entitled to Summary Judgment on Plaintiffs' Declaratory and Injunctive Relief Claims.

Courts recognize that state officials may be sued in their official capacities for prospective injunctive relief under § 1983:

> In *Will v. Michigan Department of State Police*, 491 U.S. 58, 70, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), the Supreme Court held that "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes" are not "persons" under § 1983. . . .
>
> *Will* recognized one vital exception to this general rule: When sued for prospective injunctive relief, a state official in his official capacity is considered a "person" for § 1983 purposes. *Will*, 491 U.S. at 71 n.10, 109 S. Ct. 2304 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985))). This exception recognizes the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), that a suit for prospective injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment immunity.

Flint v. Dennison, 488 F.3d 816, 825 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 882 (2008).

Whether Plaintiffs seek declaratory and injunctive relief pursuant to § 1983 against the OHA trustees in their official capacities in Count I of the First Amended Complaint is unclear. However, Plaintiffs do clearly seek such relief from the OHA

trustees in their official capacities in Count II, which seeks declaratory and injunctive relief with respect to OHA's support of the Akaka Bill. To the extent declaratory and injunctive relief is sought under § 1983 in Count I and II, the OHA trustees sued in their official capacities are entitled to summary judgment.

In so ruling, this court is not relying on the OHA trustees' argument that Plaintiffs' claim with respect to the Akaka Bill is not ripe because that bill has not yet been finalized or enacted by Congress. Plaintiffs are asserting that any expenditure of trust funds in support of legislation that does not clearly benefit only native Hawaiians is improper. Although the Akaka Bill might be amended to support only native Hawaiians' rights, that is not an amendment that the OHA trustees have sought. This case instead involves whether the trustees are properly exercising their discretion in using trust assets to support iterations of the Akaka Bill that are being proposed.

As discussed above, the OHA trustees properly exercised their considerable discretion and fiduciary judgment in determining that public trust funds could be used to support the Akaka Bill, the Native Hawaiian Legal Corporation, the Nā Pua No'eau Education Program, and Alu Like. Plaintiffs are therefore not entitled to either a declaration that the expending of the public trust funds in that manner violates the Admission Act or an injunction prohibiting such conduct.

In Count IV, Plaintiffs seek a declaration that clearly established federal law requires public trust funds to be used solely for the betterment of the conditions of native Hawaiians. As discussed above, the Admission Act requires the public trust to be used for one of five enumerated purposes. Whether or not state law requires the OHA trustees to use the trust solely for the betterment of the conditions of native Hawaiians, federal law is not so restricted.

C. The Court Declines to Strike Plaintiffs' Concise Statement.

The OHA trustees ask the court to strike Plaintiffs' Concise Statement. The trustees claim that this document may exceed the page and/or word limitation applicable to concise statements and that it lacks the certificate of compliance required by local court rule. The court declines to strike Plaintiffs' concise statement. First, much of the length of Plaintiffs' Concise Statement results from its quoting of Defendants' Concise Statement. Had Plaintiffs simply referred to paragraph numbers from Defendants' Concise Statement along with their explanation as to whether the facts asserted therein were disputed or admitted, the concise statement would have been significantly shorter and within the applicable limitations. More importantly, however, because Defendants are being granted summary judgment by this order, they are not prejudiced by Plaintiffs' Concise Statement.

D. The Court Declines to Strike The State of Hawaii's Position Statement.

On May 22, 2008, the State of Hawaii submitted a statement regarding its position on the OHA trustee's second motion for summary judgment. Plaintiffs ask the court to strike that position statement on the ground that the state is not a party to this case. The court denies Plaintiffs' motion, as the Ninth Circuit has allowed the state to intervene in this matter. *See Day v. Apoliona,* 505 F.3d 963 (9th Cir. 2007). This court does not read that allowance as limited to appellate proceedings. Even were the Ninth Circuit's ruling so limited, this court would itself permit the State to intervene here.

III. CONCLUSION.

For the foregoing reasons, summary judgment is granted in favor of Defendants on the remaining claims asserted in the First Amended Complaint. This order renders moot the State of Hawaii's separate Motion for Summary Judgment (June 4, 2008). This order also renders moot Wendell Marumoto's motion to intervene (June 16, 2008). Because no other claims remain for adjudication, the Clerk of Court is directed to enter judgment in favor of Defendants, to terminate all pending motions, and to close this case.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 20, 2008.

/s/ Susan Oki Mollway
Susan Oki Mollway
United States District Judge

[SEAL]

Day, et al. v. Apoliona, et al., Civ. No. 05-00649 SOM/BMK; ORDER GRANTING SECOND MOTION FOR SUMMARY JUDGMENT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGIL E. DAY; MEL HOOMANAWANUI; JOSIAH L. HOOHULI; PATRICK L. KAHAWAIOLAA; SAMUEL L. KEALOHA, Jr.,

Plaintiffs,

and

WENDELL MARUMOTO,

Plaintiff-intervenor-Appellant,

v.

HAUNANI APOLIONA, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian affairs; ROWENA AKANA; DANTE CARPENTER; DONALD CATALUNA; LINDA KEAWE'EHU DELA CRUZ; COLETTE Y. PI'IPI MACHADO; BOYD P. MOSSMAN; OSWALD K. STENDER; JOHN D. WAIHEE, IV, Trustees of the Office of Hawaiian Affairs of the State of Hawaii sued in their official capacities for declaratory and prospective injunctive relief

No. 08-16668

D.C. No. 1:05-CV-00649-SOM-BMK
District of Hawaii, Honolulu

ORDER

(Filed Dec. 22, 2009)

sued in individual capacities for damages; CLAYTON HEE; CHARLES OTA, Former Trustees of the Office of Hawaiian Affairs of the State of Hawaii, sued in their individual capacities for damages,

Defendants-Appellees,

and

STATE OF HAWAII,

Defendant-intervenor-Appellee.

Before: BEEZER, GRABER and FISHER, Circuit Judges.

The panel has voted to deny appellant's petition for panel or en banc rehearing; and Judge Beezer has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for panel or en banc rehearing, filed October 28, 2009, is **DENIED**.

H. William Burgess
Attorney at Law
2299-C Round Top Drive • Honolulu, Hawaii 96822
Telephone: (808) 947-3234 • Fax: (808) 947-5822
Email: hwburgess@hawaii.rr.com

May 5, 2008

(Filed May 29, 2008)

Mark J. Bennett
Attorney General of Hawaii,
William J. Wynhoff
Deputy Attorney General,
Charleen M. Aina
Deputy Attorney General,
State of Hawaii
465 King Street,
Suite 300
Honolulu, Hawaii 96813

Via FAX: 586-1239 and
Via email: Hawaiiag@hawaii.gov

Via email:
Bill.J.Wynhoff@hawaii.gov

Via email:
Charleen.M.Aina@hawaii.gov

Re: *Day v. Apoliona*, CV 05-00649 SOM-BMK

Gentlemen and Lady:

I understand the Plaintiffs in the above case challenge expenditures of funds and assets from the "§5(f) trust" for "lobbying in favor of" the Akaka bill and supporting three social service programs for Hawaiians. As you know, I represent the plaintiffs in *Kuroiwa v. Lingle,* who challenge the same expenditures, among others.

The docket in *Day v. Apoliona* indicates the OHA Defendants have moved for summary judgment and the hearing is set for Monday, June 9, 2008 at 9:00 am. Plaintiffs' memo in opp is due May 22. 2008 and the OHA Defendants' reply is due on Thursday, May 29, 2008. The State of Hawaii has apparently not yet taken a position on the OHA motion.

If the OHA Defendants prevail in *Day,* the State will be free to continue to distribute trust funds and assets to OHA exclusively for native Hawaiian or Hawaiian beneficiaries; and OHA will be free to spend those funds for the betterment of native Hawaiians or Hawaiians at the expense of the trust estate and the other beneficiaries. According to its most recently published financial statements OHA already holds some $450 million plus extensive ceded or other public lands from past distributions of "§5(f) trust" funds and assets, and, in addition continues to receive annual distributions of $15.1 million. The State has never made any distributions of trust funds or assets to or for the pro rata share of the "§5(f) trust" for beneficiaries who happen to have no Hawaiian ancestry.

As you know, the State of Hawaii is the Trustee of the "§5(f) trust" which is for the benefit of *all* the people of Hawaii, not simply for native Hawaiians or Hawaiians; Its fiduciary duty to all the people of Hawaii requires that it treat beneficiaries impartially and that it *not* comply with trust terms that violate public policy or are illegal, such as provisions requiring or permitting invidious discrimination. Where

such an illegal trust term is present the Trustee has a duty, under the *cy pres* doctrine to seek reformation of the terms of the trust. The Trustee has a duty to defend the trust estate from invalid claims; and where its fiduciary duties conflict with its interest as trustee of another trust, the Trustee may not exercise trust powers affected by the conflict without court authorization.

Under Hawaii Probate Rule 42(b), made applicable to attorneys practicing in the United States District Court by LR 83.3, an attorney employed by a fiduciary for a trust "shall owe a duty to notify . . . beneficiaries . . . of activities of the fiduciary actually known by the attorney to be illegal that threaten the security of the trust assets or the interests of the beneficiaries." Under Rule 42(c) an attorney for a . . . trust is an officer of the court and shall assist the court in securing the efficient and effective management of the estate. The attorney has an obligation to monitor the status of the estate and to ensure that required actions . . . are performed timely. The attorney, after prior notice to the fiduciary, shall have an obligation to bring to the attention of the court the nonfeasance of the fiduciary.

As Professor Randall W. Roth asks in the May 2008 Honolulu magazine, "Is Something Broken?" To paraphrase the quip of Senior U.S. District Judge Sam King, in referring to the Bishop Estate trustees, I wonder if our Governor and some State attorneys, including the *parens patriae* himself, know how to spell the word *fiduciary*.

The Attorney General and Mr. Lau and Ms. Aina are so conflicted because of their years of advocacy for the interests of OHA, and native Hawaiians and Hawaiians, at the expense of the trust estate and the other beneficiaries, they should immediately withdraw as counsel or be sanctioned. If Mr. Wynhoff can oppose OHA's motion vigorously and without reservation, he would appear to be free of conflict.

Please consider this a demand that Mr. Wynhoff or some capable attorney free of conflict, inform the Trustee State of Hawaii and its Governor and other responsible officials of their fiduciary duties to all the beneficiaries; and vigorously oppose the OHA motion. If the client refuses to allow an unconflicted attorney to do so, you should bring such nonfeasance to the attention of the court. The constitutionality of §4 of the Admission Act should be challenged by the State; as should §5(f) to the extent that it is construed or applied to permit or require the State to give native Hawaiian or Hawaiian beneficiaries any right, title or interest in the "§5(f) trust" not given equally of other beneficiaries.

Day v. Apoliona is an opportunity to fix the damage caused by the past failings of our fiduciaries in the highest positions. That can be accomplished by a capable unconflicted attorney representing the State and its officials zealously opposing the OHA motion and seeking recovery of the $450 million and public real estate now held by OHA; and seeking to enjoin further distributions of trust funds or assets to or by OHA.

Please let me know by the close of business Friday May 9, 2008 whether and, if so, how you will fulfill your fiduciary duties under Rule 42 of the Probate Rules in performing legal services in *Day v. Apoliona*.

Very truly yours,

/s/ H. William Burgess
H. William Burgess